

FOREST SERVICE  
U.S. DEPARTMENT OF AGRICULTURE  
(HEIRS OF FRANK KITKA)

IBLA 93-550

Decided August 3, 1995

Appeal from a decision of the Alaska State Office, Bureau of Land Management, approving Native allotment application A-033437.

Affirmed.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

A Native allotment application that was rejected in 1961 for 156 of the 160 acres claimed, without giving the applicant a hearing on a disputed question of fact, was properly reinstated in 1979, and adjudicated, as required by sec. 905(a) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a) (1988).

2. Alaska: Native Allotments

Actual occupancy and continuous use of a tract of land by an Alaskan Native prior to its inclusion within a national forest confers a preference right to an allotment under the Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970). The applicant's preference right is not adversely affected because use and occupancy occurred prior to passage of the 1906 Act, or because the application was filed subsequently to the proclamation creating the forest withdrawal.

APPEARANCES: James J. Ustasiewski, Esq., Office of the General Counsel, U.S. Department of Agriculture, Juneau, Alaska, for the Forest Service; Regina L. Sleater, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

## OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Forest Service (FS), U.S. Department of Agriculture, has appealed from a June 1, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), approving Frank Kitka's Native allotment application A-033437.

On November 30, 1956, the Bureau of Indian Affairs (BIA) filed with BLM Native allotment application A-033437 on behalf of Frank Kitka, pursuant to the Act of May 17, 1906, 34 Stat. 197 (which, as amended by section 1(a) through (e) of the Act of August 2, 1956, ch. 891, 70 Stat. 954, was codified at 43 U.S.C. §§ 270-1 through 270-3 (1970), repealed effective December 18, 1971, subject to pending applications, by section 18(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1988)).

Frank Kitka was born in 1889. In his Native allotment application filed in 1956, he applied for 160 acres of land located on Chichagof Island in the Tongass National Forest, claiming use and occupancy "since time immemorial by family."

The land applied for by Kitka was included in the "Alexander Archipelago Forest Reserve" created by Presidential Proclamation No. 37 on August 20, 1902, which "reserved" the land, "subject to any valid right," from settlement, entry or sale. 32 Stat. 2025 (1902). The reserve was subsequently incorporated in the Tongass National Forest. Various documents in the record date Kitka's use and occupancy from before the creation of the forest reserve.

On March 23, 1961, BLM issued a decision rejecting Kitka's application as to all but 4 acres, finding that he had failed to show use and occupancy of the entire 160-acre parcel claimed. Kitka appealed the decision, asserting use of the land for over 70 years for hunting, fishing, root gathering, and berry picking. On December 7, 1961, BLM affirmed its previous decision. Kitka appealed that decision to the Secretary. On June 7, 1963, the Assistant Solicitor, Land Appeals, acting pursuant to authority delegated from the Secretary, issued a decision affirming BLM's December 7, 1961, decision (Frank Kitka, A-29341).

Kitka died on December 26, 1969. BLM issued Allotment Certificate No. 50-79-0081 to Kitka's heirs on May 8, 1979, for 4.14 acres designated under U.S. Survey No. 5148.

A June 18, 1981, memorandum from BLM's Chief, Branch of Lands and Minerals Operations, Alaska State Office, to BIA states that Kitka's Native allotment application A-033437 "was reinstated on September 10, 1979 for approximately 155.86 acres, pending further determination." <sup>1/</sup>

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<sup>1/</sup> In its decision, BLM describes the land as 156 acres in "T. 51 S., R. 61 E., Sec. 8, SW1/4; Sec. 17, N1/2NW1/4."

On January 29, 1993, BLM issued a notice of the reinstatement stating therein that the State of Alaska had been "inadvertently omitted from the copy list" for the 1981 memorandum. Pursuant to section 905(a)(5) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(a)(5) (1988), BLM offered the State of Alaska 60 days within which to protest the reinstatement. There is no record in the case file of any protest from the State.

On appeal, FS observes that in order to obtain any rights under the Native Allotment Act of 1906 a Native was required to be the head of a family or 21 years of age, in addition to occupying the land which he claimed. It contends that under the 1956 amendment of the 1906 Act, a Native could establish a preference right to land within a national forest only if he made substantially continuous use and occupancy of the land prior to the establishment of the forest. FS argues that the land was withdrawn before Kitka "could establish a preference right, or any other rights, under the Native Allotment Act" (Statement of Reasons (SOR) at 4). Citing the Alaska Organic Act of May 17, 1884, section 8, 23 Stat. 24, 26, FS contends that an Alaska Native could establish no rights, prior to the passage of the Native Allotment Act on May 17, 1906, to land withdrawn as part of the Tongass National Forest on August 20, 1902. FS argues that by the 1956 amendment, Congress intended only to protect national forests, and did not intend to recognize a right to an allotment in national forests which were reserved prior to passage of the Native Allotment Act (SOR at 7, 8).

FS also asserts that BLM correctly rejected Kitka's Native allotment application in 1961 and has given no reason for reinstating it. FS argues that since the application was correctly rejected in 1961, it was not pending before the Department on December 18, 1971, and the doctrine of administrative finality bars readjudication. 2/

In its answer, BLM indicates that Kitka's application was reinstated as to the rejected acreage because Kitka had not been afforded a hearing on a disputed question of fact, as required by Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) (Answer at 2-3).

BLM points out that in its earlier decisions regarding Kitka's allotment application it had determined that Kitka had established qualifying use and occupancy prior to the 1902 withdrawal. The question at the time of the prior adjudication was whether Kitka had used all or only a portion

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2/ Although FS does not specifically argue that Kitka's heirs should return to Federal ownership the 4.14 acres conveyed by allotment certificate in May 1979, that is the effect of its argument that all the land included in the allotment application was included in the forest reserve prior to the time Kitka could have established a preference right to an allotment.

of the land identified in his allotment application. Upon reexamination, BLM states that it "determined that the evidence in the case file taken as a whole shows that Mr. Kitka used and occupied the entire acreage for which he applied in a qualifying manner prior to the establishment of the forest, under today's precedents and authorities" (Answer at 5).

BLM asserts that reservation of the forest in 1902, prior to passage of the Native Allotment Act in 1906, is not determinative of the status of Kitka's Native allotment application. BLM asserts that the intent of the Native Allotment Act was to give Alaska Natives a means of obtaining rights to lands which they had been occupying.

[1] We discuss first the question of administrative finality. BLM is required by section 905(a) of ANILCA, 43 U.S.C. § 1634(a) (1988), to reinstate, for either legislative approval or adjudication, any Native allotment application that was rejected by the Department without an opportunity for a hearing on a disputed question of fact, as required by Pence v. Kleppe, supra. 3/ Lack of compliance with Pence vitiates the administrative finality that would otherwise attend rejection of the application. Forest Service U.S. Department of Agriculture (Heirs of Archie Lawrence), 128 IBLA 393, 396 (1994), and cases cited. In this case, Kitka's application was rejected as to 97 percent of the land applied for without hearing. Therefore, BLM properly reinstated the application.

[2] Inclusion of the land within the national forest does not preclude Kitka's heirs from obtaining his allotment if his use and occupancy preceded establishment of the forest. Forest Service U.S. Department of Agriculture (Heirs of Archie Lawrence), supra at 394; see 43 U.S.C. § 270-2 (1970); Yakutat & Southern Railway v. Harry, 48 L.D. 362, 364 (1921). The Native Allotment Act of May 17, 1906, as amended by section 2 of the Act of August 2, 1956, 43 U.S.C. § 270-2 (1970), provided:

Allotments in national forests may be made under section 270-1 to 270-3 of this title if founded on occupancy of the land prior to the establishment of the particular forest or if the Secretary of Agriculture certifies that the land in an application for an allotment is chiefly valuable for agricultural or grazing purposes. [4/]

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3/ In this case, Kitka's allotment was not legislatively approved because, although his use and occupancy predated the withdrawal, the lands described were not unreserved on Dec. 13, 1968, a prerequisite for legislative approval under 43 U.S.C. § 1634(a)(1) (1988).

4/ FS acknowledges that the 1956 amendment allowed allotments in national forests where the application is founded on use and occupancy prior to establishment of the forest. However, citing Shields v. United States, 504 F. Supp. 1216, 1219 (D. Alaska 1981), aff'd, 698 F.2d 987 (9th Cir.

Rather than operating to preclude the establishment of Native rights, the Alaska Organic Act, (23 Stat. 24, 26) and the Act of June 6, 1900, 31 Stat. 321, 330, recognized and protected Native possessory rights. See Sandra M. Pestrikoff, 23 IBLA 197, 202 (1976). It was on the basis of rights established by Kitka prior to the establishment of the forest that BLM granted him an allotment of 4.14 acres in 1979. The change in BLM's rationale between then and now is simply the finding that Kitka established rights to more than 4.14 acres prior to the establishment of the forest. FS has made no arguments disputing the amount of land used and occupied by Kitka and the file contains affidavits of area residents attesting to his use and occupancy of 160 acres. Moreover, the fact that a portion of Kitka's use and occupancy was as a minor is not preclusive of his establishment of rights.

As cited in United States v. Akootchook, 123 IBLA 6, 11 (1992), the court held in George v. Hodel, No. A86-113 (D. Alaska, Apr. 30, 1987), that the Department's interpretation that "an allotment applicant's use and occupancy be independent and exclusive of immediate family members \* \* \* is unreasonable and inconsistent with the terms of the Native Allotment Act and the Act's regulations." In distinguishing the facts in George from those in Akootchook, the Board stated that in George

there was evidence that the applicant had achieved adulthood pursuant to Tlingit tradition at the time of withdrawal, as well as evidence of his independent use and occupancy of the land prior to that date. As noted above, achieving adulthood is not an absolute requirement, and with proof of independent use and occupancy as a minor, the regulatory requirements can be satisfied by a minor. In this case neither applicant provided any evidence of either having achieved adulthood or of independent use and occupancy prior to withdrawal.

123 IBLA at 11-12.

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fn. 4 (continued)

1983), FS also suggests that by passing section 2, "Congress intended only to protect National Forests and did not intend to recognize a right to an allotment in National Forests that had been reserved prior to passage of the Native Allotment Act" (SOR at 7 (emphasis in original)). The issue decided in both cases was that Alaskan Natives applying for allotments within a national forest were required to establish personal, rather than ancestral, use and occupancy prior to establishment of the national forest. What District Court Judge Fitzgerald said in the portion of the opinion cited by FS was that Congress intended "to restrict allotments within national forests by prohibiting them except to those individuals who could demonstrate personal occupancy of the land prior to the establishment of the forest." 504 F. Supp. at 1219-20.

In this case, there is sufficient evidence in the case record to support BLM's finding that Kitka satisfied the use and occupancy requirements of the Native Allotment Act. We conclude that BLM properly reinstated and approved Native allotment application A-033437.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur.

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James L. Bymes  
Chief Administrative Judge

